

Calif. Reinforces Broker Shield Against Policyholder Suits

By **Bibeka Shrestha**

Law360, New York (November 20, 2013, 8:12 PM ET) -- A California appeals court has held that insurance brokers do not have an implied duty to investigate and fulfill a client's coverage needs when placing policies, preserving the state's conservative stance on broker liability despite persistent efforts by unhappy policyholders to go after brokers' wallets.

The appeals court ruled that remodeling contractor San Diego Assemblers couldn't force its broker Work Comp for Less Insurance Services Inc. to pay for losses from an explosion and fire at a restaurant that hired Assemblers. The lawsuit was brought by the restaurant's insurer Golden Eagle Insurance, which stood in the place of Assemblers, whose own insurer had denied coverage because of an exclusion for prior completed work.

According to the ruling, published Oct. 28, Work Comp for Less did not owe a duty to Assemblers to take out liability insurance with coverage for prior completed work. Assemblers hadn't specifically requested such coverage and repeatedly had told its broker to get the cheapest possible insurance policy.

Chris St. Jeanos, a partner in Willkie Farr & Gallagher LLP's insurance and reinsurance group, said the appeals court ruling is consistent with prior holdings by courts in California, New York and elsewhere.

"It's the latest in a line of decisions in California that have defined and narrowed the scope of the duty owed by an insurance broker to the policyholder," St. Jeanos said. "[However] it won't be the end of the fight with respect to what a policyholder will claim a broker will do."

In its ruling, the appeals court refused to hold that the broker had an implied contractual duty to proactively determine and procure insurance policies to meet Assemblers' coverage needs, turning down arguments that establishing that "previously unrecognized" duty would promote fairness by holding brokers to the same standards as other professionals.

"Whatever the merits of these policy arguments, it is not difficult to conceive of countervailing policy considerations, including the likelihood such an implied contractual duty might cause brokers to oversell insurance to their clients in an effort to avoid the prospect of later professional liability," the appeals court said.

The decision stressed that only the Legislature could impose such a broad duty on brokers, if that was, in fact, in the best interests of the California people. The ruling noted that the insolvent Assemblers hadn't requested the prior completed work coverage and probably couldn't afford it anyway.

The California appeals court stood by a prior ruling that said brokers could violate a duty to clients only if they misrepresent insurance coverage provided to a client, in cases in which a client asks for a specific kind of coverage and when brokers hold themselves out as experts on the type of insurance a client seeks.

Edward Garson, a Wilson Elser Moskowitz Edelman & Dicker LLP partner based in San Francisco, said plaintiffs' lawyers consistently had tried to expand the duties of brokers, and the Assemblers decision will aid brokers in the ongoing fight.

"It's good to see that the courts are not eroding that protection," Garson said. "It certainly gives us a case to cite in our briefs in cases where we defend brokers."

Some courts have refused to expand brokers' duties because of a reluctance to create a separate line of insurance litigation for policyholders that are unable to score coverage, according to Melinda Margolies, a partner at Kaufman Borgeest & Ryan LLP.

"You can imagine the hornets' nest that courts would find themselves in if every denial of coverage from an insurer resulted in a separate broker [errors and omissions] claim," Margolies said. "It would be impossible for the brokers to manage that type of court-imposed sweeping duty to clients. The San Diego Assemblers court recognizes that issue."

Courts have recognized that policyholders may be in a better position than insurance brokers in determining their risks, according to St. Jeanos.

"The insurance broker is not required to make sure that the insured has insurance coverage for every possible risk the policyholder might face," he said.

While California law has limited brokers' duties, brokers still can face extensive discovery before rulings in their favor are reached, attorneys say.

"It's pretty limited liability that brokers face, but on the other hand they still have to go through this whole long litigation to defend themselves," Margolies said.

Robert Chesler, a shareholder at Anderson Kill PC, said policyholders with more favorable facts can be successful in lawsuits against brokers.

"Some courts, including in New Jersey, look at the broker more like a risk manager. They say it's the broker's job to ask these questions," he said. "The case law is not fully developed [in New Jersey], but it's going in the direction of holding the broker to a higher standard."

Either way, brokers should be careful to document their communications with clients and not rely on memories, keeping track of the requests that policyholders have made, Chesler said.

Moreover, brokers that advertise that they can get policyholders the best coverage may inadvertently create a special relationship with their clients, which could expand their duties, according to Chesler.

"You see more and more frequently brokers holding themselves out as experts," he said.

--Editing by Elizabeth Bowen and Richard McVay.

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